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Cover Page Footnote

Chief Judge of the State of New York. This article is adapted from the Eleventh Annual John F. Sonnett Memorial Lecture, delivered by the Chief Judge at the Fordham University School of Law on February 24, 1981.

WASTE NOT, WAIT NOT—A CONSIDERATION OF FEDERAL AND STATE JURISDICTION

LAWRENCE H. COOKE*

A paradox of our time is legal scarcity amidst plenty. It is consistent with other incongruities such as momentous scientific advances and an apparent dearth of natural resources, shocking rises in violent crime in a society better educated than ever before, and an inflationary spiral during economic recession. The rubber band between demand and supply in almost any field—in the halls of government, in the commercial marketplace, and in the circles of culture—is now stretching in both directions. The recitation of parallels could be almost endless.

I have always considered my Father as the personification of virtue. He was a man of common sense and logic—with his feet always solidly on the ground. A cobbler's son, he earned his way through life and frequently referred to those who lived beyond their means as having a "champagne appetite and a beer income."¹ He frequently recited a jingle that went something like "eat it up, clean it up, sew it up, use it up" and ended with the proverb of "waste not, want not." Having realized the inability of our material cornucopia to send forth an endless supply and the futility of an economy of extravagance, our mentality moves from expectations of profusion to those of moderation to provide even the physical necessities of life. The same course is generally outlined for government, in which programs and appropriations are slashed at random, and the shadows of Propositions 13 and 2 1/2 cast their pall over budgetary councils.² For the judiciary in particular, there is an analogous imbalance. A constant avalanche of litigation at the instigation of an endless horde of suitors seriously threatens to engulf every apparatus of justice—the physical facilities, the judicial and nonjudicial personnel, the tested methods and protections, and indeed, the system of justice itself.

* Chief Judge of the State of New York. This article is adapted from the Eleventh Annual John F. Sonnett Memorial Lecture, delivered by the Chief Judge at the Fordham University School of Law on February 24, 1981.

1. This is an American variant of "Beggar's person and Emperor's mouth," 2 J. Doolittle, *A Vocabulary and Hand-Book of the Chinese Language*, Romanized in the Mandarin Dialect 189 (1872), also corrupted to "a beer salary and champagne appetite."

2. In a newspaper article it is stated that "[f]or the first time since Proposition 2 1/2 was approved in November amid predictions of fiscal chaos, city officials and leaders of the banking and financial community here are talking openly about bankruptcy for the city." Knight, *Boston Prepares to Retrench As Tax Cut Drains Treasury*, N.Y. Times, Feb. 16, 1981, § A, at 10, col. 1. The plights of cities such as New York and Cleveland are recalled.

In June 1980, Chief Justice Warren Burger, in welcoming remarks to the American Law Institute (ALI), stated that "[i]t is surely plain by now that both federal and state courts share the burdens of what has been called 'the litigation explosion.'"³ He then added that "[s]ome thoughtful observers tell us that this enormous expansion of litigation is a result of the failure of the political processes to meet the peoples' expectations."⁴ Eleven years earlier, the ALI made a study of allocation of jurisdiction and reported that "the present inquiry has a special urgency because of the continually expanding workload of the federal courts and the delay of justice resulting therefrom."⁵ In the state courts of Minnesota, litigation has doubled in the last ten years, but the number of judges has remained constant.⁶ Although the number of dispositions rose because of efforts of the judges, the filing of indictments increased last year by 19.1% in New York City; the statewide increase was 13.3%.⁷ Recently, Laurence H. Tribe, Professor of Constitutional Law at Harvard, wryly observed that "[i]f court backlogs grow at their present rate, our children may not be able to bring a lawsuit to a conclusion within their lifetime."⁸ President Carter expressed his concern to the Los Angeles County Bar Association over this "interminable delay—especially when delay itself can often mean victory on one side."⁹

In September 1980, Senator Strom Thurmond, now Chairman of the Senate Judiciary Committee, introduced a bill to establish a Federal Jurisdiction Review and Revision Commission.¹⁰ The Commission would study federal and state court jurisdiction, including problems of substantive law, civil and criminal procedure, workload of the courts, and case processing.¹¹ Senator Thurmond stated that he was introducing the legislation because of his "belief that our legal

3. Address by Chief Justice Warren E. Burger, American Law Institute (June 10, 1980), *reprinted in* 126 Cong. Rec. S8964, S8965 (daily ed. June 30, 1980) [hereinafter cited as Burger Speech].

4. *Id.*

5. ALI, Study of the Division of Jurisdiction Between State and Federal Courts 1 (1969).

6. Address by Hon. Robert J. Sheran, Chief Justice of the Minnesota Supreme Court, State/Federal Judicial Council Meeting in Brainerd, Minnesota (Aug. 19-21, 1980).

7. State of N.Y. Office of Court Administration, Press Release (March 18, 1981).

8. *Time*, Aug. 20, 1979, at 48, 51.

9. Address by President Jimmy Carter, Los Angeles County Bar Association, 100th Anniversary Luncheon (May 4, 1978), *reprinted in* 64 A.B.A.J. 840, 842 (1978).

10. S. 3123, 96th Cong., 2d Sess., 126 Cong. Rec. S12768 (daily ed. Sept. 17, 1980).

11. *Id.*; see 126 Cong. Rec. S12767 (daily ed. Sept. 17, 1980) (remarks of Sen. Thurmond).

system is drifting into a posture of blurring the jurisdiction between the State and Federal courts" and that "[i]ncreasing caseloads in the Federal courts reveal a trend which could eventually lead to a total breakdown of traditional federalist principles as we know them."¹² Quoting Chief Justice Burger, he pointed out that in the past decade Congress has enacted no less than seventy new statutes enlarging the jurisdiction of federal courts; many of these statutes expand federal jurisdiction to cover relief already available in state courts.¹³

Any survey of federal and state court jurisdiction requires an examination of the historical roots of our judicial systems and a recognition of the interrelationship of the federal and state governments. When the delegates to the Constitutional Convention gathered at Philadelphia in 1787, they came from thirteen self-governing and sovereign states. Each state had its own courts, structured with a jurisprudence similar to that of England and flavored by a variety of colonial prescriptions. There was no preexistent federal superstructure or dual pattern of government such as the one that evolved from the men at Philadelphia—"[m]ost of [whom] had been warned before [leaving] home that they had no right to do more than amend the Articles of Confederation."¹⁴

The face of government changed with the adoption of the Constitution. There emerged the intriguing concept of dual sovereignty, federal and state, as applied to the central federal union and the component states. The system was described as an "indestructible Union, composed of indestructible States."¹⁵ The judicial article of this new Constitution provided for "one supreme Court, and . . . such inferior Courts as the Congress may from time to time ordain and establish"¹⁶ and specified the cases to which the judicial power extends.¹⁷ Therefore, a federal judicial system was erected alongside, or atop, the individual state courts.

Another landmark was reached with the passage of the Judiciary Act of 1789,¹⁸ by which Congress immediately exercised its power to create inferior federal courts. The federal courts are courts of limited jurisdiction, empowered to hear only such cases as are within the judicial power of the United States as defined in the Constitution and entrusted to them by a jurisdictional grant by Congress. In contrast, each state has courts of general jurisdiction, and these courts enjoy a

12. 126 Cong. Rec. S12767 (daily ed. Sept. 17, 1980) (remarks of Sen. Thurmond).

13. *Id.* (quoting Burger Speech, *supra* note 3, at S8965).

14. 1 D. Perkins & G. Van Deusen, *The United States of America: A History* 191 (1962).

15. *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868).

16. U.S. Const. art. III, § 1.

17. *Id.* § 2.

18. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

presumption of jurisdiction over a particular controversy that may be overcome only by a strong showing to the contrary. Chief Justice Burger, in reference to the ALI's study of the jurisdiction of state and federal courts,¹⁹ has observed that "[u]narticulated, but implicit, in the Institute's study was that the state courts of this country are the basic instrument of justice under our system, and this, of course, is the heart of what we call federalism."²⁰

Perhaps Senator Thurmond, in his observations on the "blurring" of jurisdiction,²¹ determined that the line of demarcation was becoming indistinct. From the tenor of his remarks, it is fair to assume that he, like others, is disturbed by this trend. Others sense a de facto "merging" and attempt to assess the consequences. The perimeters of the expression "merger of state and federal courts" have not been demarked. In the context employed, an "organizational merger" is not suggested, but "merger" seems to imply that more and more the state and federal courts, using similar methods, are plowing over the same ground. In a 1977 address, Professor Dan Meador, then Assistant Attorney General in the Office of Improvements in the Administration of Justice, posed the question: "Are we heading for a merger of federal and state courts?"²² In intimating bases that might elicit an affirmative response, Professor Meador cited "the opening of the federal trial courts to some business which had always been handled exclusively by the state courts"²³ and a "growing uniformity in the law being applied by both and in the rules of procedures being used."²⁴ Similarly, a 1979 report to the Conference of Chief Justices from the Task Force on a State Court Improvement Act mentioned "the Federal-State Partnership in the Delivery of Justice."²⁵

Awareness of the possibility of merger has not been confined to these comments. Proposed changes in federal diversity jurisdiction have inspired intense differences. State appellate judges have been known to fume as determinations of their highest courts have been invalidated at the hands of a single United States district court judge. Federal judges have occasionally rankled when required to preside over garden-variety tort and contract disputes instead of nationally significant legal issues.

19. See ALI, *supra* note 5, at 7-8.

20. Burger, *To Weaken Our State Courts Is To Destroy Federalism*, Judges' J., Spring 1978, at 11, 12.

21. See notes 10-13 *supra* and accompanying text.

22. Meador, *Are We Heading for a Merger of Federal and State Courts?*, Judges' J., Spring 1978, at 9.

23. *Id.* at 46.

24. *Id.* at 47.

25. *Hearings on S. 2387 Before the Subcomm. on Jurisprudence and Governmental Relations of the Senate Comm. on the Judiciary*, 96th Cong., 1st & 2d Sess. 151 (1979-1980) [hereinafter cited as *Hearings*].

Consideration of whether state-federal judicial merger, viewed by some as gradual but definite, is a reality reveals the dearth of satisfactory empirical data on this subject.²⁶ Information would be required to determine if merger exists and, as a preface, the notion of merger must be defined to permit the experiential analysis to proceed. If merger were found, a diagnosis could be made to determine whether it is a problem, a blessing, or a mere phenomenon. Designs for judicial or legislative treatment or surgery would follow. In any event, the gathering of information would serve a propitious purpose either in activating the highly motivated or in allaying their fears.

A fairly recent report of a Department of Justice Committee on Revision of the Federal Judicial System broadcast the distress signal that those courts "now face a crisis of overload, a crisis so serious that it threatens the capacity of the federal system to function as it should. . . . [I]t is therefore a crisis for the nation."²⁷ As for state courts, in the twenty states providing full information for the decade ending in 1976, there was an average caseload increase of 43% in the trial courts of general jurisdiction.²⁸ In those same states, the average appellate caseload doubled during the same period.²⁹

Obviously, this recital does not warrant complacency in approach or inefficiency in operation. More money could provide more courtrooms and more judicial personnel, but solid reliance on this possibility is not warranted in the face of projected cuts in the federal budget of over forty-one billion dollars and sizeable reductions in federal aid to the states.³⁰ "[T]he 1980s [will be] a decade of limited resources for courts" ³¹ Certainly waste can never be justified, and it is submitted that there are certain areas in the jurisdictional allocation between federal and state courts in which savings in time and effort can be accomplished.

The framers of the Constitution drew a design in which the state courts would be the primary guarantors of constitutional rights.³² By virtue of the federal supremacy clause,³³ state courts were obliged to apply federal law when applicable, but there was little to apply in the early years. For the better part of the first century, the only signifi-

26. Burger Speech, *supra* note 3, at S8965. See also Fischer, *Institutional Competency: Some Reflections on Judicial Activism in the Realm of Forum Allocation Between State and Federal Courts*, 34 Miami L. Rev. 180 (1980).

27. U.S. Dep't of Justice, *The Needs of the Federal Courts*, Report of the Committee on Revision of the Federal Judicial System 1 (1977).

28. National Center of State Courts, *State Court Caseload Statistics: Annual Report*, 1976, at 133-38 (1980).

29. *Id.* at 50-51.

30. N.Y. Times, Feb. 22, 1981, § 1, at 1, col. 6.

31. Steelman, *Options for Reducing Civil Volume and Delay: A Review and Analysis for the 1980's*, State Ct. J., Fall 1980, at 9, 10.

32. See generally Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953).

33. U.S. Const. art. VI, § 2.

cant federal incursion into state court affairs was the infrequent review by the United States Supreme Court of determinations by a state's highest judicial body.

The Civil War and the subsequent Reconstruction aroused an intense spirit of nationalism and produced demands for an expansion of federal authority. From this atmosphere came the opening of the federal nisi prius courts to judicial matters previously handled exclusively by the state courts. In the late 1860's, Congress enacted legislation that expanded the category of diversity cases that could be removed to the federal courts³⁴ and, for the first time, authorized writs of habeas corpus for persons detained by the states.³⁵ The fourteenth amendment was adopted, imposing upon the states as a matter of federal law the responsibility for ensuring the rights of equal protection and due process. In the succeeding decade, Congress granted to federal trial courts the jurisdiction to entertain suits arising under federal law;³⁶ Congress also enacted section 1983 of the Civil Rights Act of 1871.³⁷ The full impact of these measures was realized, not in their infancy, but in more recent years, and because of these measures an enormous flood of cases has poured into the federal trial system. Vast numbers of state criminal cases have been pervasively reviewed and, as a result of *Ex parte Young*,³⁸ numerous state office holders have been enjoined in the performance of official duties.

The concurrent jurisdiction enjoyed by both systems has long aroused judicial and legislative concern. Proposals to reduce duplications of jurisdiction include sharply limiting the scope of the diversity jurisdiction of federal courts³⁹ and eliminating the federal question jurisdiction of state courts. The underlying bases of these suggestions have been the obvious merit of jurisdictional clarity and the overriding desire to channel genuinely federal causes to federal courts and genuinely state causes to state courts. Thus far, however, the proclivity of attorneys for a choice of forum, a luxury we can no longer afford, has prevailed over judicial efforts to secure jurisdictional precision.

The most incessant abrader of judicial feelings may be the overturn of the deliberative judgment of the highest court of a state by a single federal trial court judge. The distinguished Chairman of the

34. Act of July 27, 1866, ch. 288, 14 Stat. 306 (current version at 28 U.S.C. § 1441 (1976)).

35. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (current version at 28 U.S.C. § 2241(c)(3) (1976)).

36. Act of March 3, 1875, ch. 137, 18 Stat. 470 (current version at 28 U.S.C. § 1331 (1976)).

37. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (1976)).

38. 209 U.S. 123 (1908).

39. H.R. 2202, 96th Cong., 1st Sess. (1979).

Conference of Chief Justices, Robert J. Sheran, recently voiced the opinion that such overturns not only incur the resentment of the Conference members, but also are not in the interest of the system as a whole.⁴⁰ Certain United States magistrates, with the consent of the parties and when authorized by the district court in which he or she serves, may even conduct any or all proceedings in civil matters including habeas corpus and order the entry of judgment in the cases.⁴¹ One proposal has been that all proceedings concerning state criminal cases containing federal issues be routed to the United States Courts of Appeals to avoid federal trial court review.

Once it has been determined that there should be a redistribution of the caseload, the most difficulty will be encountered in isolating those cases that should be diverted from their present situs. The allocation should be based on sound reasoning. Judge Henry Friendly, a member of the United States Court of Appeals for the Second Circuit, would remove from federal forums not only diversity jurisdiction, but also "state prisoner habeas corpus cases, numerous criminal cases, and much federal question litigation such as environmental protection, personal injury actions created by federal statutes, and most section 1983 suits."⁴² Although some view these proposals as too drastic, the recommendations emanate from a respected authority and deserve serious consideration. Moreover, it should be noted that there are more than ten times as many general jurisdiction state judges as there are federal district judges,⁴³ and state courts handle well over 90% of the cases filed in any given year.⁴⁴

If our federal and state court dockets are as heavily laden as reported, and if our systems are being taxed so that prompt and well-considered justice is not being delivered to substantial segments of society as claimed largely because of insufficient judicial personpower and resources—and I do not doubt these premises—then the day has arrived when there must be a survey of the systems and an updated allocation of the jurisdiction between the federal and state courts. This is not the time to tolerate a haphazard pattern of jurisdiction that by its very intricacy breeds litigation with festering procedural nuances. We can ill afford unnecessary duplication of judicial effort. We are haunted by the specter of criminal cases that run the full gamut of state trial and appellate levels only to start anew up the

40. Remarks of Hon. Robert J. Sheran, Chief Justice of the Supreme Court of Minnesota, National Center for State Courts and Marshall-Wythe School of Law Seminar on State Courts and Federalism in the 1980's, Williamsburg, Virginia (Jan. 24, 1981).

41. 28 U.S.C. § 636(c) (Supp. 1979).

42. Sheran & Isaacman, *State Cases Belong in State Courts*, 12 Creighton L. Rev. 1, 23-24 (1978).

43. Burger, *supra* note 20, at 12.

44. *Hearings*, *supra* note 25, at 140.

ladder of federal courts and then perhaps somewhere along the line return to the beginning of the obstacle course. The process may take many years.

In 1959, Chief Justice Warren said that "[i]t is essential that we achieve a proper jurisdictional balance between federal and state court systems, assigning to each system those cases most appropriate in light of the basic principles of federalism."⁴⁵ In his speech to the ALI, Chief Justice Burger raised for consideration the question "whether the time [had] come for a broader reappraisal of the allocation of jurisdiction" than that included in the 1969 ALI report.⁴⁶ History furnishes instances of disdain for state judiciaries. For this attitude there is no longer any justification. Recent years have seen extraordinary efforts toward improvement. These include the establishment of the National College for the Judiciary, the institution of state training courses for judges, such as in New York State where yearly training of five days is mandatory for all judges of courts of record, the requirement of minimum qualifications in most states for judges serving in courts with significant responsibilities, the initiation of training in modern management methods provided by the Institute for Court Management, the provision of technical assistance and support programs by the National Center for State Courts, and highly motivated efforts of both the American Judicature Society and the American Bar Association.

People are looking for leadership, but those who seek a different and more efficient utilization of judicial resources should expect reaction ranging from confrontation to "no-holds-barred" opposition. In the words of Arthur T. Vanderbilt, "[m]anifestly judicial reform is no sport for the shortwinded or for lawyers who are afraid of temporary defeat."⁴⁷ The responsibility for providing justice must be divided between the federal and state court systems so they might realize their maximum potential by utilizing their full capacity as efficaciously as possible. As American citizens, we live under a government committed "to establish justice," and a malfunction of our judicial apparatus anywhere is reason for the disquiet of all of us. If we allot spheres of jurisdiction in such a way as to avoid overlap and to free judicial components from repetition of effort, then we will not squander our judicial substance, and delay in the delivery of justice will be reduced to a minimum. We can then say, "waste not, wait not."

There is much to be gained from the uniformity and stability generated from a central authority. There is also advantage in dis-

45. Burger, *supra* note 20, at 11 (quoting Address by Chief Justice Earl Warren, American Law Institute (May 1959)).

46. Burger Speech, *supra* note 3, at S8966.

47. E. Gerhart, Arthur T. Vanderbilt: The Compleat Counsellor iii (1980).

persed authority that can operate with more accommodation. We can alter our structures, by modernization, by an infusion of capital, and by innovation, but in the end, the ultimate test is whether we have afforded the citizenry a vehicle guided by competent and impartial judges for the prompt and just resolution of their disputes, under prevailing law applicable to all in equal measure.